IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No.

WILLIAM E. EMMICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF.

I.

REPLY TO RESPONDENT'S STATEMENT ON JURISDICTION.

The petitioner petitioned this Court for a Writ of Certiorari and therein requested that the Writ issue to the Supreme Court of the State of Illinois instead of the Appellate Court of Illinois, First District. The plaintiff had recovered a judgment in the Superior Court of Cook County, Illinois. The Appellate Court of Illinois, First District, reversed this judgment and petitioner's petition for leave to appeal was denied by the Supreme Court of the State of Illinois. Petitioner ordered a certified copy of the record herein from the Supreme Court of Illinois and sent this record to this Court. The Transcript of the Record, however, has been returned to the Appellate Court of Illinois, First District.

The petition was filed in apt time and clearly sets out

all of the essential facts and asks relief from the judgment of the Appellate Court of Illinois, First District, as well as the Supreme Court of Illinois. The Transcript of Record filed contains a complete record of the case, all of the pleadings and testimony in abstract form and all of the orders of both the Supreme Court of Illinois and the Appellate Court of Illinois, First District.

Technically, however, respondent is correct in stating that the writ should be directed to the Appellate Court of Illinois, First District, and petitioner is therefore filing a motion and amendment herewith asking that the Writ be directed to the Appellate Court of Illinois, First District.

The error is one of form and not of substance and steps having been taken to correct it in apt time and before this court has considered the matter, petitioner submits that his Petition for Writ of Certiorari should be considered on its merits.

II.

REPLY TO RESPONDENT'S ARGUMENT.

Petitioner takes the position that this was a dangerous crossing—an extrahazardous one used daily by many gasoline trucks—and that a condition arose that required warning by *sound* in addition to sight; or warning by physically placing something between its oncoming train and vehicles on the highway—such as gates or a watchman. The gasoline truck had stopped at a point beyond the one signal light and so close to the other that the driver of the truck may not have been able to see it before the lights began to operate. The truck driver started across the track apparently unaware of the oncoming train.

Petitioner contends that it was negligence under these conditions not to have protected the crossing with bells, gates, or a watchman.

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MOTION TO AMEND PETITION FOR WRIT OF CERTIORARI AND THE BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes petitioner (appellant) herein, and respectfully moves this Court for leave to file the accompanying amendment to petitioner's Petition For Writ Of Certiorari and to his brief in support of the Petition.

Petitioner petitioned this Court for a Writ Of Certiorari and therein requested that the Writ issue to the Supreme Court of the State of Illinois instead of the Appellate Court of Illinois, First District. The plaintiff had recovered a judgment in the Superior Court of Cook County, Illinois. The Appellate Court of Illinois, First District, reversed this judgment and petitioner's petition for leave to appeal

was denied by the Supreme Court of the State of Illinois. Petitioner ordered a certified copy of the record herein from the Supreme Court of Illinois and sent the record to this Court. The Transcript of the Record has been returned to the Appellate Court of Illinois, First District.

The relief asked by this motion is timely in that the Court has not as yet considered the matter and the motion merely asks to correct a matter of procedure, a technicality in the form of the petition. The original petition contains all of the facts and clearly sets out all of the essentials of a Petition For Writ Of Certiorari. The petition asks that the Court "sustain the verdict of the jury and the judgment of the trial court *by reversing the judgment of the Appellate Court of the State of Illinois* and the decision of the Supreme Court of the State of Illinois denying the Petition for Leave to Appeal." (Petition for Writ of Certiorari, page 2) The petition further states: "*The Appellate Court of the State of Illinois* erroneously found 'that there is no evidence of negligence on the part of the defendant and that the trial court should have entered a judgment *non obstante veredicto'*; and the Supreme Court of the State of Illinois, by denying the petition for rehearing, upheld the Illinois Appellate Court." (Petition for Writ of Certiorari, page 4) that "in these circumstances the question is: May the *Illinois Appellate Court* and the Illinois Supreme Court reweigh the evidence and hold for naught the finding of the jury?" (Petition for Writ of Certiorari, page 5) that "*The Illinois Appellate Court* and the Supreme Court of the State of Illinois have decided an important question of federal law which has not been but should be settled by this Court. Under the Federal Employers' Liability Act one of the duties resting upon a railroad company is the use of reasonable diligence to provide and maintain for its employees a reasonably safe place to work. This obviously includes adequate pro-

tection at crossings against collisions with other vehicles."

"*The Appellate Court of Illinois* and the Supreme Court of Illinois have decided a federal question of substance and have decided it in a way probably not in accord with applicable decisions of the Supreme Court of the United States. It is submitted that these reasons call for the exercise of this Court's power of review." (Petition for Writ of Certiorari, page 6.)

Under these facts certainly the petitioner is entitled to have his petition considered on its merits. The petition was filed in the proper court in proper time and notice was served upon the proper respondent in apt time, the respondent's rights in no way will be harmed by the granting of this motion.

Respectfully submitted,

WILLIAM E. EMMICK,
Petitioner,

By EDWARD J. BRADLEY,
Attorney for Petitioner.

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A CORPORATION,

Respondent.

AMENDMENT TO PETITION FOR WRIT OF CERTIORARI AND TO BRIEF IN SUPPORT THEREOF.

Plaintiff hereby amends his Petition For Writ of Certiorari and Brief in Support Thereof by substituting "The Appellate Court of Illinois, First District" in lieu of "The Supreme Court of the State of Illinois" where same appears in said petition on the cover thereof; page 1 thereof; and page 7 thereof.

Petitioner further amends his Petition for Writ of Certiorari by amending the prayer of said petition appearing on page 6 of said petition to read as follows:

> "Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court commanding the Appellate Court of Illinois, First District, to certify and send to this

Court for its review and determination on a day certain named therein a complete transcript of the record in the case numbered and entitled on its docket as Number 44653, William E. Emmick, Appellee, *vs.* The Baltimore and Ohio Railroad Company, a corporation, Appellant; that the judgment of the Appellate Court of Illinois, First District, be reversed by this Court; and that the Petitioner may have such other and further relief as seems just."

EDWARD J. BRADLEY,
Attorney for Petitioner.

JUL 7 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1949

No. 99

WILLIAM E. EMMICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWIN H. BURGESS,
Baltimore and Ohio Railroad Company
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Attorney for Respondent.

JAMES F. WRIGHT,
FAY WARREN JOHNSON,
Of Counsel.

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Summary Statement.

Two interdependent points are plainly jurisdictional: (1) the writ of certiorari should have been directed to the Appellate Court of Illinois instead of the Supreme Court of Illinois, as the highest court in the state in which a decision could be had; (2) the record filed from the state Supreme Court does not support issuance of the writ of certiorari herein, since it is only the Appellate Court record that properly may be certified for the final reviewable judgment.

In addition, the Appellate Court of Illinois did not err in directing entry of judgment n.o.v. for respondent railroad, in an action under the Federal Employers' Liability Act, because of a complete absence of negligence on respondent's part in petitioner's accident and injuries.

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vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation

Respondent.

PRELIMINARY STATEMENT AS TO JURISDICTION AND JURISDICTIONAL QUESTIONS.

In this case the writ of certorari is directed to the Supreme Court of Illinois to the end presumably that the judgment order of the state Supreme Court in cause No. 31437, entitled William E. Emmick, Petitioner vs. The Baltimore and Ohio Railroad, a corporation, may be reversed, and as on the complete transcript of record in that cause. (Pet., p. 6). On the record filed herein however, it appears indirectly that the state Supreme Court declined, in the exercise of its discretionary power, to grant leave to petitioner to appeal from a judgment of the Appellate

Court of Illinois, First District, which reversed a judgment for petitioner in an action under the Federal Employers' Liability Act and directed the entry of judgment n.o.v. for respondent railroad (rec. 10, 436).

On the record filed (state Supreme Court), the decision of the Appellate Court of Illinois appears indirectly as well (rec. 6-10). But taking note of it, as petitioner manifestly intends, the writ of certiorari sought should have been directed to the Appellate Court of Illinois and not to the state Supreme Court under, for instance, *Randall* v. *Board of Commissioners,* 261 U.S. 252-3, and *Cincinnati Second Nat. Bank* v. *Okeana First Nat. Bank,* 242 U.S. 600, 601, 603. Because upon the denial by the state Supreme Court of petitioner's leave to appeal from the judgment of the Appellate Court of Illinois, the said Appellate Court of Illinois was the highest court in the state in which a decision could be had under, for example, *Western Union Tel. Co.* v. *Crovo,* 220 U.S. 364, 366, *Chicago & E. I. Ry. Co.* v. *Industrial Commission of Illinois,* 284 U.S. 296, 297-8, *Minneapolis, St. P. S.S.M. Ry. Co.* v. *Rock,* 279 U.S. 410, 411-2, rehearing denied, 50 S. Ct. 79, which may be reviewable by the Supreme Court of the United States under the statute and rules of Court, *i. e.,* Title 28, USCA, sec. 1257, and Rule 38, pertaining to certiorari to state courts. Further, under the leave to appeal practice in Illinois, upon denial of the petition for leave to appeal herein, under the statute and Rule 32 of the Supreme Court of Illinois, the record was "forthwith returned" to the Clerk of the Appellate Court of Illinois (Pars. 259.32, 199 (2), 198(1), Illinois Revised Stats. 1949). Moreover, under, for example, *Hodges* v. *Snyder,* 261 U.S. 600, 601, the writ of certiorari must go where the record is finally found, such as to the Appellate Court of Illinois in this proceeding. Hence the proper transcript of record is also absent for issuance of the writ of certiorari herein.

Respondent therefore submits that it follows the application for the writ of certiorari herein is fatally defective, in manner, form, and content, and should be dismissed.

Wherefore respondent asks that the petition for the writ of certiorari be dismissed.

As to the questions raised in the petition for certiorari, respondent further contends that the Appellate Court of Illinois properly reversed a judgment for petitioner and directed entry of judgment n.o.v. for respondent. Because respondent violated no duty owing petitioner under the Federal Employers' Liability Act; further, the wilful conduct of a third party, over whom respondent had no control, as found on the facts by the Appellate Court, occasioned petitioner's accident and injuries; and, too, the decision and judgment of the Appellate Court followed controlling legal principles as laid down in decisions of the Supreme Court of the United States.

Statement of the Case.

Petitioner William E. Emmick was a fireman on the first engine of a two-engined passenger train enroute eastward from St. Louis, Missouri, on November 10, 1945, to Washington, Indiana, and points east (rec. 194, 212). The second engine was being taken to Washington, Indiana; it was working its way too, making steam and noise (rec. 195, 199). En route, at the 12th Street Crossing of the railroad, a public highway at the eastern edge of the village of Lawrenceville, Illinois, about 12:20 P.M., the train collided with a loaded gasolene truck of the co-defendant below, Girton Brothers, Inc. The gasolene was exploded in the collision and the engines and passenger coaches derailed (rec. 216, 286, 287). Owen C. Bruce was the engineer on the first engine. The driver of the gasolene truck was William Barnett. He and engineer Bruce were killed in the collision or ensuing derailment (Rec. 194, 325, 334).

Petitioner suffered burns and steam scalds complained of (rec. 123). The gasolene truck came up from the south, on engineer Bruce's side of the engine, against flasher lights for the crossing under testimony for petitioner and other undisputed testimony (rec. 69, 89, 60). A train-trip, one located 3,419 feet back or west of the 12th Street Crossing, set the flasher lights in operation electrically (Rec. 59, 69, 243, 247, 250). The testimony was undisputed also that the gasolene truck was driven upon the crossing in front of the train slowly but continuously (rec. 89, 95, 181, 318); further, that engineer Bruce whistled continuously of the approach of the train up to and through Lawrenceville (rec. 94, 181, 186, 189, 276, 294, 297, 303). Both engines also carried automatic air bells (rec. 135), and both were working steam and making noise (rec. 111, 195).

At the 12th Street Crossing proper, and between nine and ten feet south of the east bound or main line of the B & O, lay a switch track (Rec. 178). A civil engineer testified the grade at the crossing was 7.77 per cent starting 41 feet south of the south rail of the switch track; then the roadway became level over the tracks (rec. 170, 172-3). At the time of the accident, a box car was on the switch track at a loading ramp commencing 26 feet west of the west curb of 12th Street (Rec. 172), with the box car being loaded with saw dust (Rec. 90). A saw mill lay about 100 feet south and west of this ramp (Rec. 184).

Some 78 feet and 8 inches south of the main track at the crossing, Texaco Lane or Illinois Street took off to a refinery located 620 feet easterly (Rec. 60, 172, 140). Barnett came from the refinery with a load of gas (Rec. 73, 335). At the intersection of Texaco Lane and 12th Street, for gas trucks moving west to 12th Street, the railroad had installed a "no right turn" to the railroad tracks light on the north east corner; this light was synchronized with the flasher lights upon each side of the crossing proper; this light also was activated by the same train trip and electrical circuit located on and along the main line commencing 3,419 feet west of the 12th Street Crossing (Rec. 60, 140-1, 228-9, 253). There were also "stop on red" signals on the flasher light masts on both sides of the crossing and also "two track" signs (rec. 228-9, 242-3). Both the "no right turn" signal and the red flasher signals were in operation as Barnett drove his gasolene truck slowly continuously upon the railroad tracks (Rec. 89, 94-5, 179, 181, 284). It took the train 30 seconds to travel this 3,419 feet or at the rate of 77.3 miles per hour (Rec. 218, 243, 283, 284).

SUMMARY OF POINTS PRESENTED AND AUTHORITIES.

Respondent railroad exercised all reasonable care to keep the gasolene truck from the tracks at the 12th Street Crossing while petitioner-fireman's passenger train was passing over it. Nor was respondent bound to, nor could it, guarantee petitioner's safety against cross-traffic absolutely. And generally a master is not liable for injuries to a servant caused by the acts or omissions of a third party over whom the master has no control.

Atlantic Coast Line R. Co. v. *Southwell,* 275 U.S. 64.

Brady v. *Southern R. Co.,* 320 U.S. 476.

Cunningham v. *Great Northern R. Co.,* 14 N. W. (2d) (N. Dak.) 752.

Dretzka v. *Chicago & N. W. R. Co.,* 256 N.W. (Wis.) 703.

Eckenrode v. *Pennsylvania R. Co.,* 164 F. 2d 996 (CCA 3rd 1947), aff'd 93 L. ed 64 (1948).

Galicich v. *Oregon Short Line,* 87 P. 2d (Wyo.) 27.

Hyland v. *Chicago & N. W. R. Co.,* 262 Ill. App. 427.

Karr v. *Chicago & N. W. R. Co.,* 108 S. W. 2d (Mo) 44.

McDoniel v. *Arkansas, L & G. R. Co.,* 53 So. (La.) 981.

Paris & G. N. Ry. Co. v. *Stafford,* 53 S. W. 2d (Tex. Civ. App.) 1019.

St. Louis-San Francisco R. Co. v. *Mills,* 271 U.S. 344.

Southern R. Co. v. *Blanton,* 192 S. E. (Ga. App.) 437.

Waller v. *Northern Pacific R. Co.,* 166 P. 2d (Ore.) 488, cert. den. 91 L.ed 640, rehearing denied 91 L. ed. 825.

Wolfe v. *Henwood,* 162 F. 2d 998 (CCA 8th 1947), cert. den. 68 S. Ct. 88.

Par. 181, chap. 95 1/2, Ill. Rev. Stat.

ARGUMENT.

Respondent railroad exercised all reasonable care to keep the gasolene truck from the tracks at the 12th Street Crossing while petitioner-fireman's passenger train was passing over it. Nor was respondent bound to, nor could it, guarantee petitioner's safety against cross-traffic absolutely. And generally a master is not liable for injuries to a servant caused by the acts or omissions of a third party over whom the master has no control.

In short, at the trial petitioner charged respondent railroad with negligence under the Federal Employers' Liability Act in a collision of train and gasolene truck on a public crossing because the train ran fast and struck the gasolene truck violently to petitioner's injury and because obstructions along the way prevented observance of motor vehicles crossing over the highway and a failure to have a signal system (flasher lights) at the crossing in proper and sufficient working order (Rec. 37, 38). At the same time petitioner charged the co-defendant below, Girton Brothers, Inc., with common law negligence because the driver of its gasolene truck failed to keep a proper lookout and tried to cross in front of the train to occasion a collision to the injury of petitioner (Rec. 38-9). Thus petitioner, as to the gasolene company defendant, made use of respondent's signal system to set up his case. Moreover, petitioner made use of a statute of Illinois, via an instruction, that a gasolene truck was prohibited from crossing a railroad track without stopping within 50 feet, and not less than 10 feet, from the nearest rail, with the driver "to look in both directions for any approaching train, and for signals indicating the approach of a train, and shall not proceed until he can do so safely." (Rec. 367). This was,

and is, chap. 95 1/2, par. 181, Ill. Revised Statutes. And admittedly in this record the driver did not stop his gasolene truck at any time in the 78 feet he traveled after coming out of Texaco Lane and making the right turn north to cross over the B&O tracks at 12th Street (Rec. 89, 94-5, 138, 179, 181, 284).

It was the decision and judgment of the Appellate Court of Illinois, which the Supreme Court of the State refused to review, that the speed of respondent's passenger train was not negligence in Illinois (Rec. 10). Further, the Appellate Court noted: "On this appeal no one disputes the negligence of the truck driver—in fact negligence, which, under the circumstances, was clearly, in our opinion, wilful and wanton." (Rec. 9). Further, it is a matter of general knowledge that judges of the Appellate Court of Illinois, in the capacities of trial and reviewing judges, have had long and extensive experience with negligence cases from within and without the state. Moreover, agreeably to the direction of the Supreme Court of the United States, the Appellate Court went on to say that, notwithstanding the wilful conduct of the driver of the gasolene truck, "This, however, does not relieve the defendant of liability under the Federal Employers' Liability Act, if we could find any evidence, as suggested, of negligence in whole or in part causing this accident." (Rec. 9). But as other conscientious courts have done before it, such as *Cunningham* v. *Great Northern R. Co.*, 14 N.W. 2d (N. Dak.) 752, 762-3 *Eckenrode* v. *Pennsylvania R. Co.*, 164 F. 2d 996, 1000 (CCA 3rd, 1947), affirmed 93 L. ed. 64, 65 (1948), the Appellate Court would not pretend there was negligence when it did not exist in the case.

Further and shortly, petitioner contends at page 13 of the petition for certiorari that, "Had automatic gates or bells been installed, or a watchman provided, the accident could readily have been averted." In answer however, clearly the statement represents wishful thinking and "hindsight" on the part of petitioner and his counsel. For every where, motorists, whether in familiar neighborhoods or strange, respect "red" traffic signals and stop for imminence of some danger on hand. Nor was the railroad respondent bound to anticipate that it would take force, or at least more than red flasher lights, to hold the driver of the gasolene truck back from the crossing while the train was progressing toward and over it. For as noted in *Brady* v. *Southern R. Co.,* 320 U. S. 476, at page 483: "Events too remote to require reasonable provision need not be anticipated." Besides automatic wig-wag signals are the more modern substitute for a crossing flagman: *Hyland* v. *Chicago & N. W. R. Co.,* 262 Ill. App. 427, 435. In the latter connection, several cases may be noted as apropos: In *Karr* v. *Chicago, R. I. & P. R. Co.,* 108 S. W. 2d (Mo.) 44, 50-1, a motorist disregarded the signals of a flagman at a railroad crossing and an oncoming train tossed the auto against the flagman to his injury. The railroad defendant was held not to be responsible for the injury under the Federal Employers' Liability Act. A similar situation and result obtained in *Dretzka* v. *Chicago & N. W. R. Co.,* 256 N. W. (Wis.) 703, with the court saying, page 705: "The defendant, having committed no act of negligence, that is, having failed to perform no duty to Dubovich (motorist), cannot be held liable for the consequences of the collision."

Going over the head so to speak of stop lights admittedly against the gasolene truck driver for a crossing at 12th Street and also a statute requiring a prior stop plus looking and listening on the part of the driver for a train and signals, petitioner further conjectures for negligence of

respondent that the presence of the box car on the side track some 26 feet west of the west curb of 12th Street may have interfered with the views of each other on the part of Bruce, the engineer of the lead engine, and Barnett the driver of the gasolene truck (Petition, p. 11). However, it may be noted, there is a complete absence of probative facts for such conjecture or conclusion. For as the Appellate Court noted in its decision (Rec. 10), the engineer of the second engine, Claude A. Reed, testified that on the way up to the crossing, he saw the gasolene truck coming onto the crossing, between the edge of the box car and the main track the train was on, and he jumped behind the boiler head of his engine for safety (Rec. 195, 196). Likewise, another railroad engineer, R. B. Keenan, on some Big 4 tracks north and west of the crossing, saw the truck before the lead engine of the B & O, coming up a slight rise south of the side track, and also the truck appeared to him to be moving all the while (Rec. 311, 313, 315). Seemingly too, engineer Bruce of the lead engine saw the gasolene truck coming onto the crossing and tried to avoid hitting it. For his engine controlled the speed and brakes of the train (Rec. 111, 194). After the collision and ensuing derailment the throttles of both engines were found closed and the brakes in the emergency position (Rec. 286). And also petitioner-fireman and other trainmen as well felt the brakes go on at or near the crossing (Rec. 143, 220, 286). Therefore the evidence was ample that, as the Appellate Court found, the box car set out at the loading platform (Rec. 90) was not an obstruction to view of either Barnett or Bruce; and that, moreover, respondent and its servants did all that reasonably could be done to avoid the collision of train and truck.

Next, it is the further contention of petitioner that the "Appeal Courts" of Illinois disregarded applicable deci-

sions of the Supreme Court in reversing the judgment for petitioner (Petition, p. 19). In more particular *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350, *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, and *Lavender* v. *Kurn*, 327 U. S. 645, are heavily quoted from, along with the even more controversial *Wilkerson* v. *McCarthy* case, 93 L. ed. 53. *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, is also quoted from. And there is a qualification in the excerpt from this latter case, respondent submits, which may well dispose of the applicability of all of these decisions to the instant case: "*Once there is a reasonable basis* for concluding that it was negligence (railroad's) which caused the injury, it would be an invasion of the jury's function for an appellate court to conclude that a different conclusion would be more reasonable." (Italics supplied). That is, and rightly so, respondent submits, the Appellate Court of Illinois under the facts did not find there was a reasonable basis for a conclusion that the negligence of the railroad, in whole or in part, occasioned petitioner's injuries.

CONCLUSION.

As said in *Wolfe* v. *Henwood*, 162 F. 2d 998, 1101-2, (CCA 8th, 1947), *certiorari denied* 68 S. Ct. 88, recent Supreme Court cases do not hold that a jury case is presented in every Federal Employers' Liability Act case; nor does the Act subject a railroad to that degree of liability imposed by a workmen's compensation law, and upon authority of *Myers* v. *Reading Co.*, 331 U. S. 477, 485. Moreover, with reference to the 12th Street Crossing as being a safe place to work or not for petitioner, there was a temporary hazardous condition for this accident which was not created by respondent railroad: that is, there was a disregard of safety signals by a motorist. And as noted in this connection for principle in *Waller* v. *Northern Pacific R. Co.*, 166 P. 2d (Ore.) 488, 498, *certiorari denied*, 91 L. ed. 640,

rehearing denied 91 L. ed. 825, "The defendant is not the insurer of the safety of employees and is not under the obligation to keep the premises absolutely safe." And the court added, "Failure to guard against a bare possibility of accident is not actionable negligence." This statement was made on authority of *Brady* v. *Southern R. Co.*, 320 U. S. 476.

Lastly, there is no absolute duty on a railroad employer to prevent injury, including fatal injury, to an employee at the hands of a third party and petitioner's injuries really came from the dereliction of Barnett, the driver of the gasolene truck, in disregarding crossing signals. It was so held as to strikes and labor troubles in *St. Louis-San Francisco R. Co.* v. *Mills*, 271 U.S. 344, *Atlantic Coast Line R. Co.* v. *Southwell*, 275 U. S. 64; as to malefactors opening a switch to derail a train at a spur track, in *McDoniel* v. *Arkansas, L. & G. R. Co.*, 53 So. (La.) 981; cf. *Paris & G. N. Ry. Co.* v. *Stafford*, 53 S. W. 2d (Tex. Civ. App.) 1019; and also as to motorists hitting trainmen at the sides of box cars at crossings in *Southern R. Co.* v. *Blanton*, 192 S. E. (Ga. App.) 437, and in *Galicich* v. *Oregon Short Line*, 87 P. 2d (Wyo.) 27.

Wherefore, it is submitted that the Appellate Court of Illinois properly reversed the judgment for plaintiff-petitioner herein and directed entry of judgment for the railroad defendant-respondent; and that the petition for the writ of certiorari should be denied.

Respectfully submitted,

EDWIN H. BURGESS,
Attorney for Respondent.

JAMES F. WRIGHT,
FAY WARREN JOHNSON,
Of Counsel.